

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

PEDRO MONTALVO,

Plaintiff,

v.

**9:10-CV-1297
(MAD/GHL)**

N. DOLDO, Deputy of Administration,

Defendant.

APPEARANCES:

OF COUNSEL:

PEDRO MONTALVO

83-B-1966

Cape Vincent Correctional Facility

Rte. 12E

P.O. Box 739

Cape Vincent, New York 13618

Plaintiff *pro se*

OFFICE OF THE ATTORNEY GENERAL

State of New York

The Capitol

Albany, New York 12224

Attorneys for Defendant

CATHY Y. SHEEHAN, ESQ.

Assistant Attorney General

Mae A. D'Agostino, U.S. District Judge

DECISION AND ORDER

This action was commenced by *pro se* plaintiff Pedro Montalvo on October 28, 2010. Dkt. No.

1. By Order of Senior District Judge Thomas J. McAvoy, plaintiff was granted leave to proceed *in forma pauperis* and the U.S. Marshal was directed to effect service of process on the sole remaining defendant. Dkt. No. 8.¹

¹ By Order of Chief District Judge Norman A. Mordue filed April 20, 2011, this action was
(continued...)

On April 26, 2011, a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was filed on behalf of defendant in lieu of an answer. Dkt. No. 15.

Plaintiff has not responded in opposition to defendant's motion.² Plaintiff has, however, filed a letter request which states, in part, as follows: "I Pedro Montalvo 83-B-1966 make a request to have this case dismissed at this point in time with the permission to reappeal in the future." Dkt. No. 18. In his letter, plaintiff further provides that "the conditions are not right at this point, please dismiss this case." *Id.*

Rule 41(a) of the Federal Rules of Civil Procedure provides, in relevant part, that a plaintiff may dismiss an action without a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment[.]" Fed. R. Civ. P. 41(a)(1)(A)(i). Rule 41(a) further provides that unless the notice provides otherwise, "the dismissal is without prejudice." Fed. R. Civ. P. 41(a)(1)(B).

As of the date hereof, defendant has not yet answered the complaint or moved for summary judgment. Moreover, defendant Doldo has advised the Court that he consents to the requested dismissal. *See* Dkt. No. 19.

Based upon the foregoing, plaintiff's request for voluntary dismissal of this action is granted.

Accordingly, the Court hereby

ORDERS that defendant's motion to dismiss (Dkt. No. 15) is **denied as moot**; and the Court

¹(...continued)
assigned to this Court for all further proceedings. Dkt. No. 13.

² At his request, plaintiff's deadline for responding in opposition to defendant's motion to dismiss was reset to July 30, 2011. *See* Text Order of Magistrate Judge George H. Lowe, filed June 27, 2011.

further

ORDERS that this action is **dismissed without prejudice** pursuant to plaintiff's request (Dkt. No. 18); and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Date: October 7, 2011
Albany, New York


Mae A. D'Agostino
U.S. District Judge